Supreme Court, U.S.
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No. 99-1277

In The

Supreme Court of the United States

PHILIP MORRIS, INCORPORATED, ET AL.,

Petitioners,

v.

HOWARD A. ENGLE, M.D., ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Florida District Court Of Appeal For The Third District

RESPONDENTS' BRIEF IN OPPOSITION

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38pp

QUESTIONS PRESENTED[1]

I. Whether there are independent and adequate state grounds for the denial of the untimely and legally insufficient motion to disqualify the state trial judge.

II. Where state law prohibits a judge from refuting allegations against him of bias and prejudice in ruling on a motion to disqualify, is the judge's required silence an admission of the accusations against him.

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[1] The petitioners' "Question Presented" is based on the false assumption that the trial judge is a member of the class. As this Brief in Opposition demonstrates, the petitioners did not make that claim in the Florida appellate court rendering the decision leading to their petition, and neither the record nor the law support the petitioners' extravagant submission.

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding, except that Liggett Group, Inc., and Brooke Group, Ltd., Inc. are defendants in the state court trial and are not respondents in this proceeding.

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JURISDICTION

The decision below rests on adequate and independent state grounds. *See Sochor v. Florida*, 504 U.S. 527, 119 L. Ed. 2d 326, 338 (1992); *Durley v. Mayo*, 351 U.S. 277, 281 (1956); *Preston v. Chicago*, 226 U.S. 447, 450 (1913). Under Florida law, a motion to disqualify is legally insufficient where based upon rumor and gossip from unidentified people, at unidentified times and under unidentified circumstances. *See Barwick v. State*, 660 So. 2d 685, 693 (Fla. 1995), *cert. denied*, 516 U.S. 1097 (1996).

The decision below is by a state intermediate appellate court and was not rendered by the highest state court in which a decision could be had. 28 U.S.C. § 1257. Upon final judgment, petitioners may appeal to the intermediate appellate court and then invoke the discretionary jurisdiction of the Florida Supreme Court. *See* FLA. R. APP. P. 9.030(a)(2). Thus the decision is subject to further review in a state tribunal and is not an effective determination of the litigation. *See Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75, 118 S. Ct. 481, 485-86 (1997). If the Florida Supreme Court does not accept jurisdiction the petitioners may seek review in this Court following a final judgment.

STATEMENT OF THE CASE

The petition is premised upon the erroneous assumption that the state court trial judge is a member of the plaintiff class of injured smokers. Stripped of that false premise, there is no basis for certiorari.

The motion to disqualify Judge Robert P. Kaye was filed pursuant to Florida Statutes and the Florida Rules of Judicial Administration which prohibit a trial judge from refuting the truth of allegations when ruling on a motion to disqualify for alleged bias or prejudice. Judge Kaye's denial of the motion to disqualify and the Florida appellate court's denial of the writ of prohibition do not constitute factual or legal support for petitioners' premise that Judge Kaye is a class member.

A. Judge Kaye Has Presided Over Two Tobacco Class Actions.

Judge Kaye has presided over tobacco litigation in Florida in which these petitioners have been the defendants for nearly nine years, beginning with *Broin v. Philip Morris*, No. 91-49738 CA (22), Circuit Court for the Eleventh Judicial Circuit, Dade County, Florida (1991) (the "flight attendant" secondhand smoking case). Judge Kaye's dismissal with prejudice of all class action claims in that case was reversed. *Broin v. Philip Morris Companies, Inc.*, 641 So. 2d 888 (Fla. 3d DCA 1994), *rev. denied*, 654 So. 2d 919 (Fla. 1995).

On remand, Judge Kaye certified the flight attendant class, stating his disagreement with class treatment:

> The court at the time it issued its first ruling that resulted in reversal, was and still is as of this writing deeply concerned with the issue of "causation". . . . [D]espite the class action, each case will require a trial, not only on damages, but also on causation. Whether this obviates the theory of "class action" or is merely putting the

> cart before the horse I leave to wiser members of the judiciary.

Certification Order, December 12, 1994, at 3-4.

The Florida Engle smokers' class action was filed on May 10, 1994, against the same tobacco defendants and was assigned to state court Judge Harold Solomon. Judge Solomon certified a nationwide class of injured smokers and their survivors on October 31, 1994. That class was reduced by size to a class of Florida citizens and residents and their survivors. *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39 (Fla. 3d DCA), *rev. denied*, 682 So. 2d 1100 (Fla. 1996). After Judge Solomon retired, the successor judge, Judge Alan Postman, entered a trial plan where punitive damages would be determined for the class during the Phase I trial on a ratio basis. The successor judge recused himself for health reasons and the Engle case was reassigned to Judge Robert P. Kaye in March 1998. The Phase I trial on liability commenced before Judge Kaye in July 1998 with jury selection.

On July 7, 1999, the jury rendered its verdict in Phase I, determining liability in favor of the class, including a finding of entitlement to punitive damages against all Defendants. Judge Kaye previously granted petitioners' motion to postpone the determination as to the amount of punitive damages on a class wide basis, to Phase II. Petitioners' post-trial motions challenging the liability verdict were denied on July 29, 1999. The first portion of the Phase II trial on compensatory damages for class representatives was scheduled for September 1999.

B. Motion to Disqualify State Court Judge Robert P. Kaye.

On August 2, 1999, petitioners filed their motion to disqualify Judge Robert P. Kaye, pursuant to Florida Rule of Judicial Administration 2.160 and Sections 38.02 and 38.10, of the Florida Statutes. The motion included:

(a) The affidavit of local Florida counsel, David L. Ross, a partner in Greenberg Traurig, P.A. and counsel for petitioner Lorillard Tobacco Company, who stated:

> On July 22, 1999, I was discussing this case generally with one of my family members. After that discussion, this family member decided to look for information on the Internet about the case . . . Later that day, this family member found on the Internet and called to my attention a news report written by Noreen Marcus that was apparently published in the Sun Sentinel on **June 8, 1997** . . . The news story refers to Judge Kaye as a "former smoker." . . . Prior to seeing that news story, I was unaware of any information indicating that Judge Kaye was a former smoker.

Motion to Disqualify, Exh. B, at ¶¶ 2-3 (emphasis added).

Defendants attach to their motion copies of various media reports, primarily in 1997; examples of these include:

(i) **Reuters Business Report of June 3, 1997**, reporting a pretrial hearing the week before:

> **The big question has been whether presiding Judge Robert Kaye is himself a smoker.** Courthouse workers said they had never seen Kaye

> smoking, but the Judge refused to comment. "I'm not going to answer that. I'm not going to say anything prejudicial" he said when asked.

Id., Exh. D (emphasis added).

> (ii) **The Lakeland Ledger, June 7, 1997**:
>
> Asked if he was a smoker, the Judge said "I'm not going to answer that. . . . "

Id., Exh. F.

> (iii) *"The Engle v. Tobacco Class Action Lawsuit July 9, 1998, Backgrounder"* by Wanda Hamilton states:
>
> . . . Dade Circuit Judge Robert Kaye, **allegedly a former smoker**. . . . [2]

Id., Exh. H (emphasis added).

(b) The affidavit of Philip Morris' counsel, Robert Heim, a partner in the law firm of Dechert Price & Rhoads, stating that on **June 1, 1999**, he received a phone call from Judge Kaye's judicial assistant advising Heim that the previous week Judge Kaye had been hospitalized with chest pains and had undergone an angioplasty for a blocked artery. *Id.*, Exh. J.

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[2] The affidavits, motion to disqualify and petition for prohibition state that petitioners' knowledge of Judge Kaye's possible smoking history came about on July 22, 1999 and thereafter as a result of Mr. Ross' unidentified family member surfing the Internet. However, the media report at Exhibit H reflects it was printed and/or distributed on July 21, 1999, one day earlier, creating an irreconcilable conflict. Motion to Disqualify, Exh. H.

(c) The affidavit of Jose E. Martinez, local counsel for the Tobacco Institute, stating that during the week of **June 7, 1999**, Mr. Martinez had a conversation with Judge Kaye in the hallway outside the courtroom during a break in the trial, at which time Judge Kaye advised Martinez that one of his arteries had had blockage. *Id.*, Exh. K.

The motion to disqualify was filed pursuant to Rule 2.160, Florida Rules of Judicial Administration, which prohibits a judge from determining or testing the legal sufficiency of a motion to disqualify for bias or passing on the truth of the facts alleged, where there is a claim that the movant will not receive a fair trial because of prejudice or bias of the judge. Petitioners' motion was also filed pursuant to Section 38.10, Florida Statutes, similarly prohibiting the judge from refuting all allegations of bias or prejudice. Defendants also filed their motion pursuant to Section 38.02, Florida Statutes, which contains a contradictory provision where the judge may refute the allegations.[3]

The trial court considered the motion to disqualify and the attached affidavits and determined that same were "legally insufficient" under state law and denied the motion to disqualify on August 4, 1999. *See* Pet. App. 2a.

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[3] Section 38.02, Florida Statutes, conflicts with the general rule of Florida Rule of Judicial Administration 2.160(f) so that the Rule would be controlling. *See Rogers v. State*, 630 So. 2d 513, 515 (Fla. 1993); *The Florida Bar Re: Amendment to Florida Rules of Judicial Administration*, 609 So. 2d 465, 466 (Fla. 1992); *In re: Amendments to Rules of Civil Procedure*, 458 So. 2d 245, 247 (Fla. 1984).

C. Petitioners File Their Petition for Writ of Prohibition Before the Third District Court of Appeal of Florida.

On August 12, 1999, petitioners filed a Petition for Writ of Prohibition in the Florida Third District Court of Appeal saying:

> Today, in a Circuit Court in Miami, a judge sits presiding over a case in which he himself **may be a party**.

Petition for Writ of Prohibition at 1 (emphasis added).

> . . . . Even if Judge Kaye is not a member of the plaintiff class, he **may be** in a position to assert a separate claim against one or more of the petitioners based upon his smoking history and medical condition. At the very least, as a former smoker with atherosclerosis, Judge Kaye **may naturally feel sympathetic** toward plaintiffs and aligned with them against petitioners in this case. . . .

Id., at 4 (emphasis added).

> Judge Kaye **May Be** a Member of the Plaintiff Class. Judge Kaye's status as a former smoker with a smoking-related type of disease means that he **may be** a member of the plaintiff class. . . .

Id., at 21 (emphasis added).

> . . . [T]he fact that there **may be uncertainty** about whether Judge Kaye's heart disease was, in fact, caused by his smoking is immaterial. . . .

> Even if Judge Kaye is, for any reason, not technically a class member, he nonetheless has a disqualifying interest in the Engle case . . .
>
> . . . [I]n the event that this Court determines that the factual record is insufficient to demonstrate Judge Kaye's interest in the case, petitioners respectfully request that the Court remand this matter to the trial court. . . .

Id., at 24, 25, 29 (emphasis added).

The Third District Court of Appeal denied the Petition for Writ of Prohibition on August 18, 1999. Petition App. 1a.

The tobacco defendants moved for rehearing, rehearing en banc and/or certification to the Florida Supreme Court, suggesting to the court that the tobacco defendants had doubt as to whether Judge Kaye would be included in the plaintiffs' class:

> . . . In the normal case, there is no doubt about the identity of the parties. In the class action context, however, the situation is entirely different. By their very nature, classes do not permit easy and certain knowledge of precisely which individuals they include. . . .

Motion for Rehearing, Rehearing En Banc and/or Certification, August 27, 1999, at 8-9.

On November 19, 1999, the Third District Court of Appeal denied petitioners' motion for rehearing, rehearing en banc and/or certification, without opinion. While the petition for prohibition was pending before the state appellate court, petitioners filed a motion to supplement the record to include an Associated Press news report of

September 2, 1999, that referred to a comment by a court employee that Judge Kaye had quit smoking in 1960 and that Judge Kaye is not a member of the class. Petitioners argued in their motion to supplement the record that this "new evidence" that Judge Kaye quit smoking approximately forty years earlier[4] was relevant on their motion to disqualify.

While the motion to supplement was pending in the state appellate court, petitioners filed a second motion to supplement the record with excerpts from the expert witness deposition of Dr. Michael Cummings relating to the size and composition of the class. Dr. Cummings was deposed on October 8, 1999, over two months after the motion to disqualify had been filed and ruled upon in the trial court. In the order denying rehearing, the Third District Court of Appeal also denied petitioners' two motions to supplement the record with matters that had never been presented before the trial judge when ruling on the motion to disqualify. *See* Pet. App. 3a. Petitioners

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[4] The record below reflects that the defendant tobacco companies maintain detailed and sophisticated statistical data as to the levels of consumption of cigarettes during the twentieth century. Statistically, there is an extremely high probability – over eighty percent – that a male of Judge Kaye's age group, approximately sixty-nine to seventy years of age, smoked at one point in his life. *See* David Burns, et al., *Cigarette Smoking Behavior in the United States*, in *Changes in Cigarette-Related Disease Risks and Their Implication for Prevention and Control*, SMOKING AND TOBACCO CONTROL MONOGRAPH NO. 8 (National Cancer Institute, Burns, David, et al., ed. 1997); Donald R. Shopland, *Tobacco Use and Its Contribution to Early Cancer Mortality with a Special Emphasis on Cigarette Smoking*, 103 ENVIRONMENTAL HEALTH PERSPECTIVES 131 (Nov. 1995).

have never presented any of these additional matters before the trial court.

D. Petitioners Continue to File Motions to Disqualify Judge Kaye; Judge Kaye Remains Unable to Refute Charges of Class Membership.

Following the settlement of the *Broin* flight attendant class action against these petitioners, individual lawsuits have been filed on behalf of flight attendants. A number of cases have fallen in Judge Kaye's division and motions to disqualify have been filed by petitioners in these cases. Because, under Florida law, Judge Kaye is precluded from challenging or contesting the truth of the allegations, the trial court may not declare he is not a class member and that he has no interest in these proceedings. *See* FLA. R. JUD. ADMIN. 2.160(f).

E. The Statement of Facts of Petitioners is Dramatically Distorted.

(i) No admissible or credible evidence established that Judge Kaye is a member of the class, yet the petitioners repeat that conclusion as an immutable fact. In the motion to disqualify before the trial court and petition for writ of prohibition before the state appellate court, petitioners showed some restraint and were quite equivocal on the issue of Judge Kaye's possible class membership.

(ii) Contrary to petitioners' assertions, throughout voir dire examination, prospective jurors who were

smokers or former smokers with possible tobacco related illnesses or whose family members had such illnesses, were not automatically excused for cause. The record reflects that petitioners often argued to retain such jurors with smoking related diseases, particularly if the juror or family member quit smoking many years earlier or where a particular juror's responses during voir dire were favorable to the defense. *See, e.g.*, Tr. 9696-9746.

(iii) Contrary to petitioners' assertions, there were many evidentiary and legal rulings throughout Phases I and II that were favorable to petitioners. The petitioners' recitation of Judge Kaye's unfavorable rulings for the defense, Pet. 5, 7-9, are irrelevant here, and simply underscore the petitioners' effort to turn the petition into a vehicle for avoiding the orderly appellate review to which they will be entitled in the Florida court system if they contend that Judge Kaye's decisions during the case denied them of a fair trial. *See R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39 (Fla. 3d DCA), *rev. denied*, 682 So. 2d 1100 (Fla. 1996); *Broin v. Philip Morris Companies, Inc.*, 641 So. 2d 888 (Fla. 3d DCA 1994), *rev. denied*, 654 So. 2d 919 (Fla. 1995).

(iv) Contrary to petitioners' assertions, petitioners did not contend in the Third District Court of Appeal that Judge Kaye was a member of the plaintiff class. *See* Pet. 7. Defendants' statements there were equivocal, *see* Petition for Writ of Prohibition at 1, 4, 21, 24-5, 29, with the alternative request for a remand for an evidentiary hearing on the issue of bias and class membership.

REASONS FOR DENYING THE PETITION

The Petition is premised on a single, erroneous assumption – that the state court judge is a class member. Petitioners have taken innuendo, rumor and gossip, combined them with the Florida law requiring the trial judge's silence in ruling on a motion to disqualify, to form a false premise.

Judge Robert P. Kaye has been presiding over tobacco litigation in Dade County state court for close to a decade. Judge Kaye was a favorite of the tobacco industry when in May 1992, he dismissed with prejudice the class action that had been filed in 1991 by flight attendants against the tobacco industry. It was not until an adverse jury verdict in July 1999 in the Florida smokers' class action, and adverse post-trial court rulings, that petitioners pieced together several two-year old news articles and the judge's recent brief illness, hoping to create colorable grounds for disqualification. However, rumors and gossip from or to unidentified people, at unidentified times and under unidentified circumstances are legally insufficient under Florida law to warrant the disqualification of a trial judge. *Barwick v. State*, 660 So. 2d 685, 693 (Fla. 1995), *cert. denied*, 516 U.S. 1097 (1996). Pursuant to state law, the motion to disqualify and the subsequent petition for writ of prohibition in the state appellate court were properly denied since legally insufficient.

Petitioners make the disingenuous argument that the silence of Judge Kaye and class counsel constitute an admission of the Judge's class membership. They are wrong. First, the class was not required to respond to the motion. Nor was there ar y rule to show cause in the state

appellate court requiring a response to the petition from class counsel. The motion and petition were legally insufficient on their face. That is the basis for denial under Florida law. *See Barwick v. State*, 660 So. 2d 685, 691 (Fla. 1995), *cert. denied*, 516 U.S. 1097 (1996); *Rogers v. State*, 630 So. 2d 513, 516 (Fla. 1993); *Fischer v. Knuck*, 497 So. 2d 240, 242 (Fla. 1986); *Dragovich v. State*, 492 So. 2d 350, 352 (Fla. 1986). Second, Florida law requires a judge presented with a disqualification motion based in whole or in part on bias to rule only on the legal sufficiency of the motion. *See* FLA. R. JUD. ADMIN. 2.160(f), Pet. App. 7a-8a. The judge is prohibited from refuting or challenging allegations of bias and prejudice, and, indeed, would be disqualified for doing so. Accordingly, no inference of truth may be drawn from the Judge's required silence. *See Rogers v. State*, 630 So. 2d 513, 515-16 (Fla. 1993). Nor may any such inference be drawn should the judge not respond to a prohibition petition:

> . . . Unless otherwise specifically ordered, the judge or lower tribunal has no obligation to file a response. The judge or lower tribunal retains the discretion to file a separate response should the judge or lower tribunal choose to do so. **The absence of a separate response by the judge or lower tribunal shall not be deemed to admit the allegations of the petition.**

FLA. R. APP. P. 9.100(e)(3) (emphasis added).

Stripped of its false premise, the petition has no merit.

I. THIS COURT LACKS JURISDICTION OVER THIS CASE.

A. The Decision Below Rests on State Law.

Petitioners have failed to meet their burden to persuade the Court that the decision below did not rest on adequate or independent state grounds. *See Sochor v. Florida*, 504 U.S. 527, 119 L. Ed. 2d 326, 338 (1992) ("[petitioner] has said nothing in this Court to persuade us that [the state law ground recited by the lower court] is either not adequate or not independent."); *Durley v. Mayo*, 351 U.S. 277, 281 (1956) (the party seeking review must demonstrate that no asserted state ground can account for the decision below).

A state court judgment resting on an independent and adequate state law ground is unreviewable. *See Preston v. Chicago*, 226 U.S. 447, 450 (1913) (state court judgment resting in part upon ruling that relief was barred by laches, cannot be reviewed by U.S. Supreme Court, although petitioner contended he was denied due process); *Neblett v. Carpenter*, 305 U.S. 297, 302 (1938) (decision by a state court amounting merely to an alleged erroneous construction of state statutes is not a denial of due process to be reviewable by the Supreme Court).

Counsel of Record for petitioners has acknowledged that this Court is without jurisdiction where, as here, a judgment or order rests on a state ground:

> Where both state and federal questions are involved in a state proceeding, a jurisdictional problem not infrequently arises as to whether the state court judgment rests on a state law ground or on the federal ground. If in fact the

> judgment rests on a state ground, the Supreme Court has no jurisdiction to review the case. In this circumstance, the state court's ruling with respect to the federal question, even though arguably wrong, becomes superfluous and thus incapable of triggering Supreme Court jurisdiction. And the ruling as to the state issue necessarily reduces the case to the vast field of garden variety state court judgments, dealing with state law only. These judgments, as Justice Brennan once put it, "not only cannot be overturned by, [but] indeed are not even reviewable by, the Supreme Court of the United States. We are utterly without jurisdiction to review such cases."

ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 140-141 (7th ed. 1993), citing Justice Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 501 (1977).

"Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment." *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952); *see also Williams v. Kaiser*, 323 U.S. 471, 477 (1945) ("And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it."); *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54-55 (1934) (Where it does not appear whether the judgment of the state court rests on a federal or a state question, and the state ground is independent and sufficient in itself to sustain the judgment, the Supreme Court will not take jurisdiction).

Counsel of record for petitioners has also recognized that where, as here, there is no written opinion and a state ground is raised in the record, there is a presumption that the judgment or order is based on that state ground.

> Where the state court enters no written opinion, despite the raising of both federal and state questions, the Court – again, with the aid of counsel – must turn to the record to determine if the state ground is sufficient to sustain the judgment. **If the state ground raised in the record is found adequate to support the judgment, the Court presumes that the judgment was based on that ground.** That presumption grows out of the principle that there must be some affirmative showing that a federal question was presented to the state court and that a decision on such question was necessary to a determination of the cause. When this principle is not clearly satisfied, especially because of the presence of an adequate state ground, jurisdiction will be declined. *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54-55 (1934); *Adams v. Russell*, 229 U.S. 353, 358-59 (1913); *Woods v. Nierstheimer*, 328 U.S. 211, 216 (1946); *Phyle v. Duffy*, 334 U.S. 431, 437 (1948); *Williams v. Kaiser*, 323 U.S. 471, 477-78 (1945). To overcome that presumption, the party seeking review "must demonstrate that neither of these state grounds can account for the decision below." *Durley v. Mayo*, 351 U.S. 277, 281 (1956). It is not enough to show that the judgment below *"might"* have rested upon a nonfederal ground." *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952); *Ellis v. Dickson*, 349 U.S. 458, 459 (1955).

ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 145-46 (7th ed. 1993) (emphasis added).

Here, the Third District Court of Appeal in Florida delivered no opinion[5] and it is apparent that the judgment below rests upon independent and adequate state grounds. First, the trial court found petitioners' disqualification motion to be "legally insufficient." *See* Pet. App. 2a. Petitioners' motion for disqualification was based upon two allegations: the bias or prejudice of the judge, and that the judge may be a class member and therefore have a financial interest in the case. A Florida court presented with a disqualification motion based in whole or part on bias "shall determine only the legal sufficiency of the [disqualification] motion and shall not pass on the truth of the facts alleged. . . . No other reason for denial shall be stated, and an order of denial shall not take issue with the motion." FLA. R. JUD. ADMIN. 2.160(f), Pet. App. 7a-8a.

In support of their disqualification motion, petitioners attach what purport to be several 1997, 1998 and 1999 news articles printed from the Internet that allege that the judge may have been or was at one time a former

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[5] The fact that the Third District delivered no opinion also bears significance as a prudential consideration relevant to this Court's exercise of its discretionary jurisdiction. "[W]e are well aware, as are Supreme Court practitioners and lower courts, that while not immune from our plenary review, ambiguous summary dispositions below tend, by their very nature, to lack the precedential significance that we generally look for in deciding whether to exercise our discretion to grant plenary review." *Lawrence v. Chater*, 516 U.S. 163, 133 L. Ed. 2d 545, 556 (1996).

smoker. Motion to Disqualify, Exhs. C-I. These articles fail to identify any sources of information and provide no other information as to whether the judge was a smoker for two weeks or two months, if at all. Under Florida law, a disqualification motion is legally insufficient where it is based upon rumor and gossip from unidentified people, at unidentified times, and under unidentified circumstances. *See Barwick v. State*, 660 So. 2d 685, 693 (Fla. 1995), *cert. denied*, 516 U.S. 1097 (1996). Accordingly, the ground of legal insufficiency is an independent and adequate state law ground foreclosing jurisdiction by this Court.

Another independent and adequate state law ground barring this Court's review is the untimeliness of the motion to disqualify. A disqualification motion is timely if filed within ten days of discovery of the facts constituting the grounds for the motion. FLA. R. JUD. ADMIN. 2.160(e), Pet. App. 7a-8a. Under Florida law, movants waive any disqualification claim which is not timely filed. *See Steinhorst v. State*, 636 So. 2d 498, 500-501 (Fla. 1994); *Guzman & Co. v. British Realty & Mortgage Corp.*, 699 So. 2d 842 (Fla. 3d DCA 1997); FLA. R. JUD. ADMIN. 2.160(e). Where a disqualification claim is waived because of tardy filing a Florida court does not even reach a movant's merits argument. *See Steinhorst v. State*, 695 So. 2d 1245, 1249 (Fla. 1997) (J. Kogan, dissenting), *cert. denied*, 522 U.S. 1022 (1998); *see also Bolling v. Lersner*, 91 U.S. 594, 595 (1876) (an untimely objection to judicial authority is an independent and adequate state law ground barring Supreme Court review).

Waiver in Florida takes place where information regarding the judge's potential conflict was reasonably

available and a litigant fails to timely move for recusal. *See Steinhorst v. State*, 636 So. 2d 498, 500 (Fla. 1994). When information about a judge appears in a newspaper, the Florida Supreme Court deems a litigant moving for judicial disqualification to be on notice of it on or around the date of publication. *See Rivera v. State*, 717 So. 2d 477, 481 n.3 (Fla. 1998) (statement made by judge to newspaper five months before trial which resulted in conviction was forever waived as ground for disqualification of judge as defendant failed to timely seek disqualification). The news articles claiming that the judge may be a former smoker were published in Reuters, with national circulation, and in the Fort Lauderdale and Palm Beach editions of a Fort Lauderdale newspaper, the Sun Sentinel in June 1997, July 1998 and June 1999. Petitioners' Motion to Disqualify, Exhs. C-I. The Sun Sentinel is sold throughout South Florida, including Miami-Dade County and in newspaper dispensers in front of the Miami-Dade County Circuit Courthouse.[6] Therefore, petitioners' motion, filed

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[6] The record reflects that petitioners follow the news carefully, as demonstrated by the tobacco defendants' motion for mistrial that was filed following the verdict in Phase I. In support of their motion, the tobacco defendants compiled every news article that appeared in the United States plus all local, state and national television newscasts that cover the verdict of July 7, 1999. It defies credulity that an industry that tracks, collects, collates and studies their opponents and presiding judges would learn for the first time on July 22, 1999 (and purely by inadvertence), that newspaper articles appearing two years earlier referred to Judge Kaye as a possible former smoker. Nor did any of the affidavits or moving papers affirmatively establish that the media departments of the tobacco company defendants did not possess the news articles in question prior to July 22, 1999. *See* Motion to Disqualify.

approximately two months after petitioners learned on June 1, 1999 of the judge's angioplasty, Motion to Disqualify, Exh. J, and years after the publication of the first news story alleging that the Judge may be a former smoker, is untimely and petitioners have waived their claim. The admixture of old news and a June 1 angioplasty did not make the August 2 motion to disqualify timely.

Waiver is also found where a motion for recusal is delayed until after the moving party has suffered an adverse ruling unless good cause for delay is shown. *Fischer v. Knuck*, 497 So. 2d 240, 243 (Fla. 1986). Here, petitioners waited until after the jury verdict in Phase I of this trial on July 7, 1999 and after post-trial judgments were ruled upon unfavorably to them before pressing their disqualification claim and have showed no good cause for delay.

The state appellate decision is a plainly correct application of settled Florida law. In Florida, a trial judge ruling on a motion for disqualification where the issue of bias has been raised is permitted only to rule on the legal sufficiency of the motion and will be automatically disqualified for refuting the movant's allegations. *See* Fla. R. Jud. Admin 2.160(f), Pet. App. 7a-8a; *Rogers v. State*, 630 So. 2d 513, 515-16 (Fla. 1993) ("When a judge has looked beyond the mere legal sufficiency of a suggestion of prejudice and attempted to refute the charges of partiality, he has then exceeded the proper scope of his inquiry and on that basis alone established grounds for his disqualification."), *quoting Bundy v. Rudd*, 366 So. 2d 440 (Fla. 1978). Where a motion and its supporting materials alleged statements made about the conduct of a

presiding judge, the timing, circumstances and sources must be identified, or the motion will be found legally insufficient. *See Barwick v. State*, 660 So. 2d 685, 693 (Fla. 1995), *cert. denied*, 516 U.S. 1097 (1996).

> . . . A legally sufficient motion for disqualification cannot be based upon rumors or gossip about what the trial judge allegedly said to unidentified people, at unidentified times, and under unidentified circumstances. . . .

Id. at 693.

Here, petitioners rely on statements in newspaper articles from 1997, 1998 and 1999 alleging that Judge Kaye may have been or was a former smoker for some unidentified period of time. These articles are based on rumor and gossip and fail to identify the source of that information, and provide no information as to the timing or circumstances of that conduct. As the disqualification motion relies on these articles for its claim that the trial judge is a former smoker, the motion is legally insufficient as a matter of law. *Barwick v. State*, 660 So. 2d 685 (Fla. 1995), *cert. denied*, 516 U.S. 1097 (1996).

Further, petitioners go to great lengths to argue that there have been a series of favorable rulings for the class, reflecting bias on the part of the trial judge. Yet, the record will reflect that the class has received a large number of unfavorable rulings from the trial court throughout this litigation. In any event, "[t]he fact that a trial judge makes an adverse ruling is not a sufficient basis for establishing prejudice." *Barwick v. State*, 660 So. 2d 685, 692 (Fla. 1995), *cert. denied*, 516 U.S. 1097 (1996); *Jackson v. State*, 599 So. 2d 103, 107 (Fla.), *cert.*

denied, *506 U.S. 1004 (1992)*; *Gilliam v. State*, 582 So. 2d 610, 611 (Fla. 1991); *Ex Parte American Steel Barrel Co.*, 230 U.S. 35, 44 (1913) (a motion for disqualification "was never intended to enable a discontented litigant to oust a judge because of adverse rulings made"); *Liteky v. United States*, 510 U.S. 540, 127 L. Ed. 2d 474, 490 (1994) ("judicial rulings alone almost never constitute a valid basis for a bias or partiality motion"). Moreover, the petitioners' complaints about those rulings are subject to appellate review and are irrelevant to a decision on certiorari.

B. The Decision Below is Not a Final Decision Rendered by the Highest Florida State Court.

The decision rendered below is not a "final" judgment for purposes of this Court's jurisdiction under 28 U.S.C. § 1257. Under the finality rule, a state court decision is not final unless and until it is not subject to further review in any other state tribunal, and it must also be final as an effective determination of the litigation and not of merely intermediate steps therein. *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75, 118 S. Ct. 481, 485-86 (1997), *citing Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945). Petitioners' reliance on an exception to the finality rule announced in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), is misplaced. Petitioners assert this Court has jurisdiction "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. In *Jefferson*, this Court rejected the same *Cox* exception

because petitioners could seek this Court's review at the end of the state court litigation. 118 S. Ct. at 486. The same is true here.

Unlike the cases cited in *Cox* in support of the exception, no state law would prohibit a later appeal by petitioners to this Court. *See Cox Broadcasting Corp.*, 420 U.S. at 481-82. Even if a state court adheres to its earlier ruling as "law of the case," that determination would not limit this Court's ability to review the issue on final judgment. *Jefferson*, 118 S. Ct. at 486. Consequently, as the state court decision is subject to further review in a state tribunal and is not an effective determination of the litigation, the decision below is not "final" within the meaning of 28 U.S.C. § 1257.

In addition, a writ of certiorari may not issue from this Court to review a state judgment where the judgment is not that of the highest court of the state in which a decision could be had. 28 U.S.C. § 1257. Where it does not affirmatively appear from the record that a decision could not be had in the highest court of a state, this Court may not assume that the state supreme court would not have taken jurisdiction. *Mullen v. Western Union Beef Co.*, 173 U.S. 116, 123 (1899). Here, as the Florida Supreme Court may yet obtain jurisdiction of the instant cause following a judgment and decide the issue before this Court, this Court is without jurisdiction to grant petitioners' writ.

The instant case remains in trial. Upon final judgment, petitioners would have a right to appeal to the intermediate appellate court, the Third District Court of Appeal, and upon any adverse ruling, to invoke discretionary review in the highest court in Florida, the Florida

Supreme Court. *See* FLA. R. APP. P. 9.030(a)(2). If the Florida Supreme Court accepts jurisdiction, it is vested with authority to review any error asserted in the record, including the error alleged herein. FLA. R. APP. P. 9.110(h). If the Supreme Court of Florida does not accept jurisdiction, or if there is no basis for jurisdiction in that court, the petitioners could then seek review in this Court. At that time, a final judgment within the meaning of § 1257, would have been rendered.

The decision that is the subject of the instant petition is the Third District Court of Appeal's denial of a writ of prohibition from an order denying petitioners' motion to disqualify the trial judge. For purposes of its review, the Florida Supreme Court does not consider the denial of a writ of prohibition relating to an unsuccessful judicial disqualification motion as the law of the case in its Court. *See Barwick v. State*, 660 So. 2d 685, 691 (Fla. 1995), *cert. denied*, 516 U.S. 1097 (1996).[7] Giving the state's highest court an opportunity to consider the issue is a compelling reason to dismiss the petition. *See California v. Rooney*, 483 U.S. 307, 314 (1987).

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[7] Even in the Third District Court of Appeal which does deem its denials of writs of prohibitions as the law of the case, petitioners may, in their appeal to that court, seek review of the Third District's ruling under an exception to the law of the case doctrine. Where litigants believe that application of the law of the case doctrine results in a "manifest injustice," as petitioners herein allegedly maintain, they may in a state court appeal urge reconsideration of the challenged decision. *See Henry v. State*, 649 So. 2d 1361, 1364 (Fla. 1994), *cert. denied*, 516 U.S. 830 (1995); *Strazzulla v. Hendrick*, 177 So. 2d 1, 4 (Fla. 1965).

II. THE FLORIDA STATE JUDGE'S REQUIRED SILENCE IS NOT AN ADMISSION OF CLASS MEMBERSHIP AND PREJUDICE WHERE FLORIDA LAW PROHIBITS THE JUDGE FROM REFUTING ALLEGATIONS AGAINST HIM IN RULING ON A MOTION TO DISQUALIFY.

Petitioners' entire argument before this Court rests upon a single allegation of "fact" that the trial judge, Judge Robert P. Kaye who presides over the Florida smokers' class action, is a member of the plaintiff class. To make their claim, petitioners have turned Florida law on its head and grossly distort the record.

Petitioners falsely allege as "fact" that Judge Kaye is a member of the plaintiff class, which consists of "[a]ll [Florida] citizens and residents, and their survivors, who have suffered, presently suffer or have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39, 40 (Fla. 3d DCA), *rev. denied*, 682 So. 2d 1100 (Fla. 1996). Petitioners' sole support for their allegation that Judge Kaye is a member of the plaintiff class is their claim that the judge's silence and his denial of their disqualification motion as legally insufficient concedes the truth of their allegation. Pet. 6-7. Petitioners rest their claim on dictum from a stale 1968 intermediate appellate court opinion, *Hooks v. State*, 207 So. 2d 459, 464-65 (Fla. 2d DCA 1968), *id.*, which is no longer good Florida law. *Hooks* concerned the proper procedure in 1967, under then governing statutes for a trial judge to follow in a judicial disqualification matter. Subsequently, the Florida Supreme Court adopted procedural rules to govern disqualification cases and has repeatedly held

that while the relevant statutes give litigants the substantive rights to seek disqualification, the Rules that it has adopted set forth the procedure to be followed in the disqualification process. *See Rogers v. State*, 630 So. 2d 513, 515 (Fla. 1993); *The Florida Bar Re: Amendment to Florida Rules of Judicial Administration*, 609 So. 2d 465, 466 (Fla. 1992); *Brown v. St. George Island, Ltd.*, 561 So. 2d 253, 255 (Fla. 1990); *Fischer v. Knuck*, 497 So. 2d 240, 242 (Fla. 1986).

The procedural rule on judicial disqualification governing this case, Florida Rule of Judicial Administration 2.160, *see* Pet. App. 7a-8a, contains none of the procedures discussed and interpreted in *Hooks*. Therefore, *Hooks* does not apply.[8] Petitioners' contention, that in denying the disqualification motion as legally insufficient the trial judge *ipso facto* conceded the truth of petitioners' asserted "fact," is therefore unfounded. Accordingly, as a matter of law, there is no support for the underlying premise to petitioners' entire argument, that the trial judge is a member of the plaintiff class, and consequently, there is no merit to petitioners' remaining argument.

Indeed, the governing procedural rule proves the converse of petitioners' claim. A judge to whom a motion to disqualify is directed, on grounds at least in part based on bias, as here, "shall determine only the legal sufficiency of the motion and shall not pass on the truth of the

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[8] Nor, it must be noted, was the dictum cited by petitioners in *Hooks* ever followed by another Florida court. Further, even if *Hooks* were applicable, the facts in that case are wholly distinguishable from the instant case. In *Hooks*, the litigant stated that the judge was a material witness in the case and issued a subpoena for him.

facts alleged. . . . No other reason for denial shall be stated, and an order of denial shall not take issue with the motion." FLA. R. JUD. ADMIN. 2.160(f), Pet. App. 7a-8a. When a judge attempts to refute the charges, the judge has exceeded the proper scope of judicial inquiry on a disqualification motion and, on that basis alone, has established grounds for disqualification even when otherwise unwarranted. *See Rogers v. State*, 630 So. 2d 513, 515-16 (Fla. 1993).

Here, petitioners moved for disqualification in the trial court on two grounds: the purported bias and the purported interest of the judge in the outcome of the case. The chief ground asserted, however, for the judge's bias was the judge's interest:

> As a class member according to plaintiffs [theory of the case], Judge Kaye cannot help but be biased or prejudiced in favor of the plaintiffs because his direct interests are aligned with them. Even if Judge Kaye were not a class member, he may have a claim against one or more of the defendants for the same conduct that is currently being tried before him, and therefore, cannot sit in judgment over defendants.

Motion to Disqualify at 10.

Because the basis of petitioners' bias motion is the judge's alleged interest in the case and the two issues are clearly intertwined, the judge properly responded only to

the legal sufficiency of their claims in accordance with Florida Rule of Judicial Administration 2.160(f).[9]

Accordingly, the trial judge was prohibited from responding to the allegations of petitioners. Had Judge Kaye declared that he is not a class member and has no financial interest in the case he would have been automatically disqualified under Florida law since he would be improperly passing on the truth of the allegations of the disqualification motion. Of course, that is precisely why the tobacco companies filed their motion to disqualify – to place Judge Kaye in a "Catch-22" dilemma.[10]

Petitioners further contend that Judge Kaye failed to follow proper judicial disqualification procedure by failing to enter an order declaring himself qualified and by failing to file a sworn statement that the grounds for the motion are untrue. Pet. 6. Yet, as stated above, Florida Rules of Judicial Administration 2.160, rather than the statute offered by the petitioners governs judicial qualification procedure. *The Florida Bar Re: Amendment to Florida Rules of Judicial Administration*, 609 So. 2d 465, 466 (Fla. 1992) (Florida Rule of Judicial Administration 2.160 "establishes the process for disqualification in all trial court proceedings"). The Florida Supreme Court has

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[9] In contrast, *Douglass v. Douglas*, 633 So. 2d 1166 (Fla. 1st DCA 1994), was premised on distinct factual allegations; the claim of bias was not predicated on the judge's alleged family relationship. *See also In re: Amendments to Rules of Civil Procedure*, 458 So. 2d 245, 247 (Fla. 1984).

[10] The Florida rule of appellate procedure governing petitions for writs of prohibition provides that the absence of a response by the judge or lower tribunal is not deemed to admit the allegations of the petition. *See* FLA. R. APP. P. 9.100(e)(3).

specifically held that the statutory requirement that the judge file a sworn statement, *see* Fla. Stat. § 38.04, is constitutionally invalid. *In re: Amendments to Rules of Civil Procedure*, 458 So. 2d 245, 247 (Fla. 1984). *See* FLA. R. APP. P. 9.100(e)(3). Accordingly, petitioners' argument that the trial judge failed to follow proper disqualification procedure is erroneous as a matter of law.

CONCLUSION

The motion to disqualify and petition for writ of prohibition were legally insufficient and untimely and were properly denied under Florida law. This petition is premised upon the erroneous assumption that the state court trial judge is a member of the plaintiff class of injured smokers. There is no record support for that erroneous premise. In view of the record in this case, and the authorities cited above, the petition should be denied.

Respectfully submitted,

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